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F. Michael Higginbotham

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RACIAL EQUALITY IN JURY SELECTION

F. MICHAEL HIGGINBOTHAM*

I. INTRODUCTION

Chief Judge Robert Bell is so well known for his groundbreaking efforts in support of access to justice programs—whether through expanding lawyer assistance opportunities or creating problem-solving courts—that his other significant legal accomplishments are often overlooked. The quest for racial equality in jury selection is one aspect in which Chief Judge Bell’s contributions have made an important and long-lasting impression. Chief Judge Bell has written eight precedent-setting opinions examining peremptory challenges and voir dire claims under federal and state law.¹ His body of material goes from his powerful reasoning in *Hill v. State*,² where, in response to the trial court’s refusal to include the defendant’s request for a racial bias question in the jury’s voir dire, he wrote that “[n]o surer way could be devised to bring the process of justice into disrepute,”³ to his principled dissent⁴ from a decision he viewed as erroneously applying the rule in *Batson v. Kentucky*,⁵ which governs how to establish a prima facie case of purposeful discrimination in jury selection.

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* Wilson Elkins Professor of Law, University of Baltimore School of Law, A.B. Brown University, J.D. Yale University, LL.M. Cambridge University.

1. The following cases involved peremptory challenges: *Richardson v. State*, 381 Md. 348, 849 A.2d 487 (2004); *Richardson v. McGriff*, 361 Md. 437, 762 A.2d 48 (2000); *Whittlesey v. State*, 340 Md. 30, 665 A.2d 223 (1995); *Jones v. State*, 343 Md. 448, 682 A.2d 248 (1996); *Mejia v. State*, 328 Md. 522, 616 A.2d 356 (1992); *State v. Gorman*, 324 Md. 124, 596 A.2d 629 (1991). The following cases involved voir dire: *Bowie v. State*, 324 Md. 1, 595 A.2d 448 (1995); *Hill v. State*, 339 Md. 275, 661 A.2d 1164 (1995).

2. 339 Md. 275, 661 A.2d 1164 (1995).

3. *Id.* at 284, 661 A.2d at 1169 (quoting *Aldridge v. United States*, 283 U.S. 308 (1931)).

4. *State v. Gorman*, 324 Md. 124, 132, 596 A.2d 629, 633 (1991).

5. 476 U.S. 79 (1986).

II. CHIEF JUDGE BELL'S JURISPRUDENCE ON RACE AND JURY SELECTION

In *Hill v. State*, a black defendant was arrested by a white police officer for possession of cocaine.⁶ At trial, the defendant requested that the court include a racial bias question in the jury's voir dire. The trial court refused, although it asked the usual questions about ability to render a fair and impartial verdict. On appeal, the issue was whether the trial court correctly refused to voir dire the jury about racial bias. The opinion, authored by Chief Judge Bell, found that a voir dire into racial bias is appropriate even if the case does not involve interracial violence. In so finding, Chief Judge Bell explained the court's reasoning: "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."⁷

In *Mejia v. State*,⁸ a Hispanic defendant was charged with rape and related sexual offenses. At trial, pursuant to the rule in *Batson*, the state used a peremptory challenge to exclude a jury member that the defendant alleged to be Hispanic. The court overruled the defendant's objection and trial proceeded, resulting in the defendant's conviction. The defendant appealed, alleging that when he objected to the peremptory challenge, he presented a prima facie case of purposeful discrimination to which the state was required to respond. The Court of Special Appeals held that the defendant failed to present a prima facie case of purposeful discrimination and that "[a] proffer, even when neither contradicted nor challenged by the [state] or the court, [was] not sufficient."⁹ On appeal, the issue was whether the defendant's objection established a prima facie case of purposeful discrimination requiring a response by the state.

The opinion, authored by Chief Judge Bell, noted that to prove purposeful discrimination the defendant must have shown that he was a member of a cognizable racial group, and that the state had exercised a peremptory challenge to remove a member of the defendant's group. The Court of Appeals determined that group membership could be assumed by observations and if the assumption goes unchallenged, the defendant need not offer additional evidence. The court ultimately concluded that the state did not respond to the defendant's assertion and that the record demonstrated that there

6. *Hill*, 339 Md. at 277, 661 A.2d at 1165.

7. *Id.* at 284, 661 A.2d at 1169.

8. 328 Md. 522, 616 A.2d 356 (1992).

9. *Id.* at 532, 616 A.2d at 361.

was only one person of Hispanic background in the venire and that person was struck by the state. On these facts, the Court of Appeals held that the defendant had established a prima facie case of discrimination, which required a response from the state. In so holding, Chief Judge Bell explained the court's reasoning:

[W]hen the State uses peremptories in a manner that assures that *no* [members of a cognizable group] will serve on a jury that is to try a [member of that cognizable group], it is at least permissible to conclude that a prima facie case of discrimination has been made out. In that circumstance, it is the effect of the use of the peremptories—exclusion of all Hispanics from the venire—not what was said or asked during *voir dire*, that is dispositive.¹⁰

In *State v. Gorman*,¹¹ the defendant was a black male who was charged with armed robbery and a handgun violation. During voir dire, the state excluded two black jurors in the jury pool through peremptory challenges. The two excluded black jurors were the only blacks in the jury pool. The state argued that the challenges were discretionary ones falling outside of *Batson*'s coverage, and did not require explanation.

After the defendant's conviction and various appeals, the Supreme Court of the United States vacated the conviction and remanded the proceedings to the Court of Special Appeals on the issue of peremptory challenges applied to black venire members.¹² After several further appeals, the Court of Appeals held that the defendant could not challenge the use of peremptory challenges against black members of the venire.¹³ Upon further appeal, the Supreme Court again vacated the Court of Appeals decision and remanded to the Court of Appeals for further consideration.¹⁴

On further consideration, the state conceded that the prosecutor's use of peremptory challenges against the only two black venire members established a prima facie case of discrimination, and that the burden had shifted to the prosecution to demonstrate a race-neutral reason for those challenges.¹⁵ On this appeal, the issue was whether the case should be remanded to the trial court so that the

10. *Id.* at 539, 616 A.2d at 355 (alterations in original) (citation omitted) (quoting *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987)).

11. 324 Md. 124, 596 A.2d 629 (1991).

12. *Gorman v. Maryland*, 480 U.S. 913 (1987).

13. *State v. Gorman*, 315 Md. 402, 554 A.2d 1203 (1991).

14. *Gorman v. Maryland*, 499 U.S. 971 (1991).

15. *State v. Gorman*, 324 Md. 124, 596 A.2d 629 (1991).

prosecution could offer race-neutral reasons for exercising peremptory challenges, or whether a new trial should be granted.¹⁶

The majority reasoned that, under *Batson*, this case should be remanded to the trial court to permit the prosecutor an opportunity to demonstrate race-neutral explanations for his peremptory challenges.¹⁷ Such remand could occur even though the prosecutor declined to provide such explanations during the trial and that six years had passed since jury selection concluded. In the view of the majority, the remand was appropriate because a reasonable possibility existed that the prosecutor could reconstruct his reasoning from the original jury list and notes, and because the trial judge had the discretion to order a new trial if the prosecutor could not demonstrate a race-neutral motivation.

In dissent, Chief Judge Bell concluded that the majority of the Court of Appeals erred in not ordering a new trial.¹⁸ Chief Judge Bell reasoned that remanding the case back to the trial court and affording the state an opportunity to supply race-neutral reasons for the peremptory challenges was problematic because the defendant's counsel gave no indication as to the availability of his records or his ability to recall information that could challenge explanations that may be given by the state, and a remand would permit the great potential for abuse and an opportunity to construct false race-neutral justifications. Explaining his reasoning, Chief Judge Bell stated:

In resolving this issue, the critical consideration is fairness, which at bottom is reflected in, and adds to, the integrity of the system. When the State is not afforded an opportunity, at the trial level, to respond to defense charges, it would be unfair not to allow it to do so after an appellate processing has found those charges sufficient, *prima facie*, to require a response. On the other hand, given the potential for abuse, the integrity of the process may be compromised when the State is given *another* opportunity to respond, notwithstanding its refusal to respond on the first occasion. That is especially the case when it is that initial refusal that caused the trial record deficiency on that critical point in the first place. In my opinion, therefore, there is a need for a bright line minimum requirement, which, if it does not exist, will preclude a limited remand. I would require, as a minimum, that the record of the proceedings reflect either that the State *was not given the opportunity to respond* to the

16. *Id.* at 129, 596 A.2d at 631.

17. *Id.* at 132, 596 A.2d at 633.

18. *Id.* at 138, 596 A.2d at 635.

defendant's allegations or some indication that the State had an articulable basis for the strikes it made.¹⁹

III. CONCLUSION

Chief Judge Bell's writings on the subject of racial equality in jury selection depict a keen understanding of the need to protect individuals against racial discrimination, especially in the administration of justice; an awareness of the harm to those individuals and to society emanating from a failure to prevent such discrimination or the appearance of discrimination; and a sensitivity to principles of fairness and equity and how those principles have been skewed by historical racial imbalance. While Chief Judge Bell's personal experience at an early age with racism was, no doubt, a constant reminder of the need for careful examination of discrimination claims and the imposition of the strongest protections against such harmful treatment, his belief in enhancing justice by improving our laws could only have come from a deep sense of moral commitment to the rule of law and the highest regard for our constitutional democracy.

One of Chief Judge Bell's heroes, Baltimore-born Justice Thurgood Marshall, who represented a teenage Bell before the Supreme Court in 1960,²⁰ was indeed smiling on those days when Bell made his pronouncements. In *Batson*, the famous 1986 Supreme Court decision prohibiting the removal by peremptory challenge of all black persons from the venire without explanations, Justice Marshall worried in his concurring opinion that the remedy the majority was providing would be inadequate to prevent racial discrimination and the perception of bias in the administration of justice. Justice Marshall explained:

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.²¹

19. *Id.* at 137-38, 596 A.2d at 635.

20. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993).

21. *Batson v. Kentucky*, 476 U.S. 79, 105 (1986).

As the only Justice that had actually litigated a capital murder case,²² and as the most experienced litigator on the Court,²³ Justice Marshall knew better than most other Justices the prosecutorial historical record. Unfortunately, that record included the exclusion of blacks so that very few ended up actually serving as jurors.

In his opinions in *Hill* and *Mejia* and his dissent in *Gorman*, Chief Judge Bell helped his hero Justice Marshall provide a “more adequate remedy” against racial discrimination in jury selection. From a concern for preventing the appearance of bias in the administration of justice, as well as actual discrimination in such proceedings, through a meticulous protection of defendant’s rights against discrimination in jury selection through careful application of *Batson*’s peremptory challenge restrictions, to a keen understanding of the harmful realities of discrimination and the need to provide strong protections against it, Chief Judge Bell significantly improved racial justice in judicial proceedings. For that contribution, all Americans owe Chief Judge Bell a debt of gratitude.

22. F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 593 (3d ed. 2010).

23. *Id.*